19334

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

HAROLD CROWLEY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 205.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

April 8, 1901, at San Juan, a term of the district court of the United States for Porto Rico began, and on the 10th a grand jury returned an indictment against plaintiff in error charging him with violating laws of the United States while employed in its postal service. The first count charged larceny of a letter, containing money and other valuables; the second that he secreted, embezzled, and destroyed such letter, with its contents; and the third likewise charged him with secreting and embezzling the letter and contents.

On April 13 a plea in abatement was filed, which alleged that various members of the grand jury were

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without requisite qualifications, and also set up objections to methods pursued in forming same. It stated that one member was a citizen of Venezuela; that another had not been a resident of Porto Rico for one year; that a number were not assessed on the last assessment roll on property valued at $200, contrary to requirements of the statute passed by the legislative assembly of Porto Rico, effective April 1, 1901, providing qualifications of jurors; and that the names of several members were not publicly drawn from a box then containing three hundred names, as prescribed by section 800, Revised Statutes of the United States, and act of June 30, 1879, and that no writs of *venire facias* were directed to such persons, as provided by section 803.

It further alleged (R., 5):

> Defendant says that he was not present in court at the time of the selection, summoning, and impaneling of the jury aforesaid, and has had no opportunity to make any challenges to the same as to the members thereof, because he did not know of said action and was not at the time represented by counsel, but that he has this day learned of the aforesaid acts for the first time and therefore immediately presents his plea.
>
> Defendant says that he has been and would be greatly prejudiced by the improper and illegal selection and impaneling of such grand jury as aforesaid, as it was composed at the times aforesaid of persons disqualified to act and who were not residents or taxpayers of Porto Rico, as required by law, and because of their unfamiliar-

> ities with the island and the conditions and circumstances, material matters in this case and relevant thereto, some of said jurors as aforesaid and having been but a few months in the island and temporarily sojourning herein.
>
> In addition to W. H. Holt, jr., and William Baun, the following gentlemen of the grand jury were American citizens: John D. H. Luce, E. L. Arnold, Henry W. Dooly, J. Rymon Latimer, foreman thereof, Charles H. Post, Frank Antonsanti, by reason of which and their supposed knowledge of such practices by grand juries in the courts of the United States might, and as defendant believes, did contend the deliberations of said jury so as to induce a finding of an indictment where the Porto Rican citizens thereof might not have otherwise done.

The record (51, 52) indicates plaintiff in error knew he was charged with offense specified in indictment, and was arrested therefor prior to April 1, 1901.

A demurrer to the plea was sustained, defendant was arraigned, and pleaded not guilty (R., 7). Afterwards a general demurrer to the indictment was interposed and overruled (R., 8).

April 15 the following order was entered:

> This case, at the request of the defendant, and the district attorney not objecting, is transferred to the next term of this court at Ponce, to be called on the third day of the term.

On May 17, at Ponce, the cause was called for trial. Objection was interposed on ground that the court had no jurisdiction to proceed, because the term was not a

regular one as provided by law, and it had no authority therefor except at such a term This objection was overruled, a jury impaneled, the cause tried, and a verdict of guilty rendered on May 18 (R., 10). No objection was made to the charge of the court. A sentence of four years in the penitentiary was imposed May 21.

On May 25, motion for new trial and arrest of sentence having been overruled (R., 16), petition for appeal to this court was granted, amount of the bond fixed, and it was ordered—

> That upon the giving of the same, with service of citation, the execution of the return be suspended and stayed until the determination of the appeal, and that a certified transcript of the record and proceedings herein be forthwith transmitted to said Supreme Court of the United States.

Citation to appear within thirty days was served June 22, 1901, and on same day the judge approved bail bond, and undertook to extend time for presenting and filing bill of exceptions to October 15, 1901. October 29, 1901, an order, signed by the judge, was filed reciting, in harmony with facts, that the district attorney, upon request of defendant's counsel, had consented to sixty days' further time for settlement of bill of exceptions, and directing that the order be made *nunc pro tunc* as of the day when former extension expired. The bill was signed and filed (R. 79) December 14, 1901. December 12, 1902, writ of error from this court was granted; on January 2, 1903, citation

was served, and transcript was filed February 2 following.

The act of Congress of April, 12, 1900 (31 Stat., c. 191, p. 77), entitled "An act temporarily to provide revenue and a civil government for Porto Rico, and for other purposes," provides:

> SEC. 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. * * *
>
> SEC. 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico.
>
> SEC. 15. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil, or criminal, continued in force by this act as it may from time to time see fit.

SEC. 34. That Porto Rico shall constitute a judicial district to be called "The district of Porto Rico." The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President. The district court for said district shall be called the district court of the United States for Porto Rico * * * and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court. The laws of the United States relating to appeals, writs of error and certiorari, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico. Regular terms of said court shall be held at San Juan, commencing on the second Monday in April and October of each year, and also at Ponce on the second Monday in January of each year, and special terms may be held at Mayaguez at such other stated times as said judge may deem expedient. All pleadings and proceedings in said court shall be conducted in the English language.

The United States district court hereby established shall be the successor to the United States provisional court established by general orders numbered eighty-eight, promulgated by Brigadier-General Davis, United States Volun-

teers, and shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued.

SEC. 35. That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; and such writs of error and appeal shall be allowed in all cases where the Constitution of the United States or a treaty thereof, or an act of Congress, is brought in question and the right claimed thereunder is denied. * * *

General Orders, No. 1, October 18, 1898 (Major-General Brooke), among other things, provided:

> The provincial and municipal laws, in so far as they effect the settlement of the private rights of persons and property and provide for the punishment of crime, will be enforced unless they are incompatible with the changed condition of Porto Rico, in which event they may be suspended by the department commander. They will be administered substantially as they were before the cession to the United States.

By General Orders, No. 88, June 27, 1899 (Brigadier-General Davis), it was provided:

> The judicial power of the provisional court hereby established shall extend to all cases

> which would be properly cognizable by the circuit or district courts of the United States under the Constitution (sec. 2); its procedure, rules, and records shall conform as nearly as practicable to those observed and kept in Federal courts (sec. 4); *the jury system may be introduced or dispensed with in any particular case in the discretion of the court* (sec. 5); and that the district attorney shall be authorized to *present to the court informations* against all parties for violations of United States statutes and regulations (sec. 7).

Prior to April 12, 1900, the local laws of Porto Rico contained no provisions for a jury of any kind except as specified by the above military order. By an act of legislative assembly, approved January 12, 1901, the right of trial by jury was established under certain conditions. (R. S. and Codes of Porto Rico, p. 171.) By an act of the same assembly, approved January 31, 1901, elaborate provision is made concerning trial by jury and qualifications of jurors. (R. S. and Codes of Porto Rico, p. 172.) Section 2 of the act of January 12 provides:

> If any person is charged with a crime by a prosecuting attorney or by a grand jury, the punishment for which is capital punishment or two years or more confinement in any penal institution of the island, he may demand a trial by jury only in the district court having jurisdiction, and it shall be granted him under the following provisions.

These acts apply only to petit juries, and at time of indictment and trial in the present cause there was nothing in the local laws providing in terms for grand juries.

Under the municipal laws of Porto Rico existing prior to its cession criminal proceedings were instituted without interposition of a grand jury, upon information by either public or private prosecutor. (See Laws of Criminal Procedure of Cuba and Porto Rico, articles 100, 270, 271, 272, 277.)

No *statutory* law of the United States requires indictment by a grand jury before one charged with an offense may be put on trial.

ARGUMENT.

HAS THIS COURT JURISDICTION?

This court's power to review causes from Porto Rico is derived from section 35, act of April 12, 1900 (31 Stat., 85, c. 199), set out above.

That part of the section giving appeals and writs of error in the same cases as from supreme courts of Territories was construed in *Royal Insurance Company* v. *Martin* (192 U. S., 149), where it was held that such causes as might have been reviewed under act of March 3, 1885 (23 Stat., 443, c. 355), when decided by the supreme court of a Territory could be now reviewed when coming from Porto Rico. This court has

repeatedly decided that under that act it had no jurisdiction in criminal cases. (*Gonzales* v. *Cunningham*, 164 U. S., 617.)

If jurisdiction exists in the present case it must be derived from that part of section 35 which provides: "And such writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied."

The Constitution has never been expressly extended to Porto Rico and the cession of the island did not render its provisions applicable therein. (*Hawaii* v. *Mankichi*, 190 U. S., 218, 220, and cases cited.)

The Constitution was not brought in question and no right claimed thereunder was denied.

No treaty was in any way brought in question.

The *validity* of no act of Congress was called in question.

I am unable to find any *statutory* law of the United States which requires action by a grand jury before trial for an offense, or which provides that no one shall be held to answer for an infamous crime unless on presentment or indictment. In *Hawaii* v. *Mankichi* (190 U. S., 218) the right to such proceeding was held not to be fundamental.

The district court for Porto Rico is not a constitutional court, and the provisions of the Revised Statutes applicable to "courts of the United States" or "district or circuit courts of the United States"

do not apply thereto. (*American Insurance Company* v. *Canter*, 1 Peters, 511, 546; *United States* v. *McMillan*, 165 U. S., 504, 510.)

The provisions of the Revised Statutes relating to empaneling of grand juries for district and circuit courts (Title 13, chapter 15) do not apply to district court of Porto Rico, because it is not a district or circuit court of the United States. (*In re Mills*, 135 U. S., 263, 267; *Reynolds* v. *United States*, 98 U. S., 145; *Ex parte Farley, Ex parte Wilson*, 40 Fed. Rep., 66.)

The sections of the Revised Statutes prescribing the qualifications of jurors relate to laws of the State wherein they are to serve, and are inapplicable to Porto Rico.

In *Clinton* v. *Engelbrecht* (13 Wall., 434), this court held that the provisions of the Revised Statutes did not apply to juries assembled in a Territory, that they should have the qualifications and be selected according to the Territorial law, and said (p. 445):

> If this opinion needed additional confirmation it would be found in the judiciary act of 1789. The regulations of that act in regard to the selection of jurors have no reference whatever to Territories. They were framed with reference to the States and can not, without violations of rules of construction, be made to apply to the Territories of the United States.

None of the statutes alleged by plaintiff in error to have been violated were applicable, and he could claim no right thereunder.

In harmony with the rule governing writs of error to State courts, to give this court jurisdiction, in any view, it was necessary that a right claimed under an act of Congress should have been specially set up at the proper time and in the proper way, the attention of the court called thereto, and that there should have been a decision against the right. (*Sayward* v. *Denny*, 158 U. S., 180.)

This court declined in *Watts* v. *United States* (91 U. S., 580) to review a criminal case from Washington Territory under a law giving it the power so to do where the Constitution, a treaty, or statute was drawn in question, because it did not appear that question had been made as to any of these.

The circumstances of the present case show that if plaintiff in error could at any time have relied on matters in his plea in abatement he did not seasonably assert them.

IN A CRIMINAL CASE FROM PORTO RICO INQUIRY BY THIS COURT SHOULD BE LIMITED TO FEDERAL QUESTIONS, AS IN WRITS OF ERROR TO STATE COURTS.

Section 709, Revised Statutes, provides that final judgments or decrees in the highest court of a State may be reexamined in this court "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed."

Section 35 of the Porto Rican act (31 Stat., 85, c. 191) provides:

> Writs of error and appeal shall be allowed in all cases where the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question, and the right claimed thereunder is denied. * * *

If the court has jurisdiction to try the present cause it is because some right claimed under an act of Congress has been denied.

Section 35 of the Foraker Act applies to final decisions of the supreme and district courts of Porto Rico, and its provisions granting review where some right claimed under an act of Congress has been denied are similar to those of the act regulating writs of error to a State court.

The established rule is that on writs of error to a State court no Federal question will be exmamined except one which was directly raised and passed upon below, and no question of general law will be considered except to sustain the action of the State court. (*Murdock* v. *Memphis*, 20 Wall., 591; *McLaughlin* v. *Fowler*, 154 U. S., 663.)

Is there reason for adopting a rule in reference to causes from Porto Rico less strict than the one which applies to causes from State courts?

I submit that nothing can now be open for consideration for the purpose of reversing the action of the court below, except whether an act of Congress has been called in question and a right claimed thereunder improperly denied.

FIRST ASSIGNMENT OF ERROR.

This assignment calls in question the action of the trial court in overruling plea in abatement filed three days after indictment was found and five days after grand jury was impaneled. The plea alleged error in drawing, impaneling, and formation of the grand jury and that certain of its members were disqualified because of failure to comply with sections 800 and 803 of the Revised Statutes and act of June 20, 1879 (21 Stat., 43), and also lack of qualifications prescribed by jury act of Porto Rico effective April 1, 1901.

The objections specified in the plea were made too late; they related to defects or imperfections in matters of form; and, moreover, did not tend to prejudice the accused.

It is a fair inference from statements in the record (pp. 51, 52) that plaintiff in error had notice of charge against him and was arrested therefor prior to the time when grand jury was impaneled, and the plea in abatement does not undertake to deny this. It does not appear that when the grand jury was formed plaintiff in error interposed objection either to array or polls, nor is any sufficient reason given for his failure so to do. It was his duty to bring forward such objections when the grand jury was being organized.

Bishop on Crim. Proc., 3 ed., vol. 1, secs. 877, 878.

"One notified by the prosecuting officer of a purpose to lay a particular charge against him before the par-

ticular grand jury, may present his challenges, the same as though under bonds to appear.

"Hence all such persons may be present at the organization and make their challenges, either to the array or to the polls.

"And if such a person chooses not to avail himself of this opportunity, and an indictment is found against him, he can not afterwards, according to the common rulings, and by statutes in many of our States, take an objection to the panel or to a particular juror which he then was entitled to, but neglected to bring forward."

Wharton's Criminal Pl. & Pr., secs. 344, 345.

In *Agnew* v. *United States* (165 U. S., 36, 44) it was held that a plea in abatement must be pleaded with strict exactness; that objections to irregularities in selecting and impaneling the grand jury must be taken at first opportunity in power of defendant; that when one is notified that his case is to be brought before the grand jury he should proceed at once to take exceptions to its competency; and that for such irregularities as do not prejudice defendant he has no cause of complaint and can take no exceptions. In reference to plea filed in that case Chief Justice Fuller, delivering the opinion, said (p. 45):

> The court opened December 3, 1895, and the indictment was returned December 12, yet defendant did not file his plea in abatement until December 17. The plea does not allege want of knowledge of threatened prosecution on the part of the defendant, nor want of opportunity

to present his objection earlier, nor assign any ground why exception was not taken or objection made before; and, moreover, the plea is fatally defective in that, although it is stated that the drawing "tended to his injury and prejudice," no grounds whatever are assigned for such a conclusion, nor does the record exhibit any such.

Bishop on Criminal Procedure, vol. 1, sec. 327.

"A plea in abatement requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision; leaving, on the one hand, nothing to be supplied by intendment or construction; and, on the other, no supposable special answer unobviated. The rule * * * requires a pleader not only to answer fully what is necessary to be answered, but also to anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea."

Lewis v. *United States*, 1 Head. (Tenn.) 329
State v. *Newer*, 7 Blackf. (Ind.) 307.
People v. *Lauder*, 82 Mich., 114.
Commonwealth v. *Smith*, 9 Mass., 106.
People v. *Jewett*, 3 Wend. (N. Y.), 314, and 6 Wend., 386.
Dowling v. *Mississippi*, 5 Smedes & M., 664.
State v. *Rickey*, 5 Halst. (N. J.), 83.

Section 1025 of the Revised Statutes provides:

No indictment found and presented by a grand jury in any district or circuit or other court

of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

United States v. *Benson*, 31 Fed. Rep., 896, 901.

United States v. *Molloy*, 31 Fed. Rep., 19, 23.

United States v. *Ewan*, 40 Fed. Rep., 451.

Wolfson v. *United States*, 101 Fed., 430.

Thompson and Merriam on Juries, sections 554, 564.

The facts alleged in the plea which might be supposed to support the conclusion that the composition of grand jury was such as to prejudice defendant are that one member, Manuel Andino, was a citizen of Venezuela, and that W. H. Holt, jr., had not been a resident of Porto Rico for one year. It does not appear how long Manuel Andino had resided in Porto Rico, and it does appear that W. H. Holt, jr., was an American citizen. The allegation that certain members were American citizens and for that reason and their supposed knowledge of the practices of grand juries in the United States defendant was prejudiced, is manifestly without merit.

No indictment was necessary. An information by the public prosecutor was all the law demanded.

Each count of what is styled the indictment was signed by the United States attorney, and if the instru-

ment is insufficient as an indictment it may be treated as an information.

An information, in its general structure, is similar to an indictment, and both are tested by the same rules in so far as the description of the offense is concerned. (*King* v. *State*, 17 Fla., 183, 186; *Merwin* v. *People*, 26 Mich., 299; *Donnelly* v. *People*, 11 Ill., 552; *State* v. *Miles*, 4 Ind., 577.)

In the courts of the United States, in the absence of statute, it is not necessary to swear to informations. (*United States* v. *Polite*, 35 Fed. Rep., 58; *Long* v. *People*, 135 Ill., 435; *State* v. *Brooks*, 33 Kans., 708; *United States* v. *Hoskins*, 5 Mackey, 478.)

Under the Spanish law, prior to cession of Porto Rico, indictments and grand juries were unknown. The formal way of commencing a prosecution was by information (Code of Criminal Procedure; secs. 101, 105, 270, 271, 272, 277), and it was not necessary that such information be under oath. Article 277, Spanish Code, does not require an oath where private prosecutor presents information, and no provision demands more of the public prosecutor.

General Orders, No. 1, issued by Major-General Brooke, October 18, 1898, declared that municipal laws for punishment of crime would be enforced unless incompatible with changed condition of Porto Rico, in which event they might be suspended, and they were to be administered substantially as before the cession.

Under methods of procedure provided for the provisional court of the United States established by Gen-

eral Orders, No. 88, every offense could be prosecuted upon information by public prosecutor. The United States district court is successor of the one established by that order.

The Foraker Act (section 8) continued the laws and ordinances of Porto Rico then in force, except as altered or amended therein, or by prior military orders, so far as not inconsistent with statutory laws of the United States not locally inapplicable.

Neither the Foraker Act nor the statutory laws of the United States make an indictment or presentment by a grand jury necessary for prosecution of a crime; no military order made, and no act of the legislative assembly of Porto Rico has made, an indictment a prerequisite to a trial for crime.

The prosecution of all crimes in Porto Rico may therefore be begun by information by the prosecuting attorney.

The right to demand presentment or indictment by a grand jury and trial by petit jury constituted as at common law is not fundamental and does not necessarily exist in all places subject to jurisdiction of the United States. (*Hawaii* v. *Mankichi.*)

In re Mills (135 U. S., 263, 267), Mr. Justice Harlan, delivering opinion of the court, said:

> It is significant that the act establishing a United States court in the Indian Territory makes no provision for a grand jury, although it does provide for petit juries in civil and criminal cases. A grand jury, by which presentments or indictments may be made for offenses

against the United States, is a creature of statute. It can not be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal. The provisions of the Revised Statutes relating to the impaneling of grand juries for the district and circuit courts (title 13, c. 15) do not apply to the court established in the Indian Territory by the act of March 1, 1889, for, although the latter is a court of the United States, it is not a district or circuit court of the United States. (*Reynolds* v. *United States*, 98 U. S., 145, 154; *Ex parte Farley, Ex parte Wilson*, 40 Fed. Rep., 66.)

The provisions of the Revised Statutes in reference to empaneling grand juries, and the qualifications of members do not apply in Porto Rico.

Section 800 of the Revised Statutes provides:

> Jurors to serve in the courts of the United States and each State, respectively, shall have the same qualifications * * * as jurors of the highest court of law in such State.

The provisions of this section are locally inapplicable to Porto Rico and were not extended there by section 14 of the Foraker Act. The same thing is true of section 2 of the act of Congress approved June 30, 1879, providing for the method in which jurors shall be drawn. Section 803 of the Revised Statutes is directory, and clearly a failure to comply with it would be a mere matter of form.

All provisions of the Revised Statutes in reference to grand jurors and formation of grand juries by their

terms apply to district and circuit courts of the United States and are inapplicable except to such courts. The district court of Porto Rico is not, in a constitutional sense, a court of the United States, and the provisions relating to jurors for such courts do not apply to it. (*In re Mills*, 135 U. S., 263.)

In any view, the objections specified in the plea to the formation and membership of the grand jury were not sufficient to render the indictment invalid.

As showing that alleged irregularities in forming the grand jury and failure to issue writs of *venire facies* were not fatal, reference is made to the case of *United States* v. *Eagan* (30 Fed. Rep., 608, 610, opinion by Mr. Justice Brewer); *United States* v. *Richardson* (28 Fed. Rep., 61); *United States* v. *Ambrose* (3 Fed. Rep., 283).

In opposition to the objection founded upon the lack of property qualifications by certain members of the jury reference is made to *United States* v. *Benson* (31 Fed. Rep., 896).

As to the objections founded upon the nonresidence of one grand juror and the alienage of another I refer to *United States* v. *Tuska*, 14 Blatch., 5; Federal Cases, No. 16, 550; *State* v. *Alexander*, 31 La. Annual, 1100; *United States* v. *Reed*, 2 Blatch., 435; Federal Cases, 16, 134; *United States* v. *Ewan*, 40 Fed. Rep., 451; *Boyington* v. *State*, 2 Porter (Ala.), 100, 135; *State* v. *Haynes*, 54 Iowa, 109; *Ex parte Harding*, 120 U. S., 782.

SECOND ASSIGNMENT OF ERROR.

This assignment challenges action of the court in overruling the general demurrer interposed by defendant to the indictment. (R. 8.)

On page 7 of record it appears that immediately after the demurrer interposed by counsel for the Government to plea in abatement was sustained defendant was duly arraigned and pleaded not guilty. After plea of not guilty was entered (R. 8) demurrer to the indictment was interposed. It was therefore too late. "A demurrer should be promptly made, and it is too late after plea is entered." (Wharton's Criminal Pl. and Pr., sec. 407 b.) Moreover, the indictment seems clearly sufficient.

THIRD ASSIGNMENT OF ERROR.

This assignment arises out of request of defendant, at close of Government's proof, to direct verdict of not guilty for various reasons then assigned. (R., 63.)

The indictment was based upon section 5467, Revised Statutes, and charges with sufficient accuracy the offense therein mentioned.

If there was defect in proof as it existed when the Government rested its case this was cured by the evidence thereafter admitted. It was within the discretion of the court to permit the Government to introduce additional proof, and no wrong was done defendant thereby.

In connection with this assignment I call attention to the fact that the bill of exceptions which appears in

record was signed after expiration of the term during which trial took place, after an appeal to this court had been prayed and perfected, a considerable time after period first granted therefor and also after expiration of any time allowed *in advance* for its settlement. The court first allowed until June 15, 1901. (R., 16.) On the 22d day of June, 1901, the court, upon agreement of counsel, extended the time until 15th of October. (R., 18.) On October 29, 1901, the district attorney agreed that time for settlement might be extended sixty days from the 22d day of October, and an order was entered in harmony therewith. (R., 20, 21.) Appeal to this court was perfected and prisoner released on bond June 22, 1901.

I suggest the court had no power to settle and sign the bill of exceptions as it undertook to do December 14, 1901, and that it can not be considered a part of the record. (*Muller* v. *Ehlers*, 91 U. S., 249, and cases cited therein; *Ensminger* v. *Powers*, 108 U. S., 292–302.)

FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

Rule 35 of this court provides that plantiff in error shall file with the clerk of the court below an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged; and certainly the general purposes for which that rule was made will require its observance in a case from

Porto Rico, although under a strict construction it might be held to apply only to writs of error taken under the judiciary act of 1891.

Section 997, Revised Statutes, provides "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

The fourth and fifth assignments are so general that they may be said to amount to nothing.

SIXTH ASSIGNMENT OF ERROR.

This assignment is upon contention (R., 9) that the court sitting at Ponce in May, 1901, had no jurisdiction to try the cause. The cause was transferred from San Juan to Ponce upon request of defendant and by rule of court a term was held there on the second Monday in May. (R., 64.) There is nothing to show that he was in any way prejudiced by trial at Ponce.

Section 34 of the Foraker act provides that "regular terms of said (district) court shall be held at San Juan commencing on the second Monday in April and October each year; also at Ponce on the second Monday in January of each year. * * *"

Sections 578, 581, and 661 of the Revised Statutes are as follows:

SEC. 578. District courts shall hold monthly adjournments of their regular terms for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

SEC. 581. A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. And any business may be transacted at such special term which might be transacted at a regular term.

SEC. 661. Any circuit court may, at its own discretion, or at the discretion of the supreme court, hold special sessions for the trial of criminal causes.

There is nothing in the record to show that the term of the court at Ponce, during which this trial took place, was not regularly held in harmony with the provisions of the statutes above quoted or proper orders.

The Foraker Act does not forbid the holding of other terms than those by it required at the times and places stated.

I SUBMIT FOR THE CONSIDERATION OF THE COURT THAT THE COMMON LAW DOES NOT PREVAIL IN PORTO RICO, AND THAT RULES OF EVIDENCE AND PROCEDURE RESTING ALONE THEREON HAVE NOTHING TO DO WITH TRIALS IN THAT ISLAND. THE WHOLE CASE ATTEMPTED TO BE MADE OUT FOR PLAINTIFF IN ERROR PROCEEDS UPON A DIFFERENT THEORY, AND CONSEQUENTLY NO ATTENTION SEEMS TO HAVE BEEN GIVEN TO THE MUNICIPAL LAW WHICH PREVAILS IN PORTO RICO, AND NO INFRACTION OF SUCH LAW HAS BEEN MADE TO APPEAR.

THE GOVERNMENT RESPECTFULLY ASKS THAT THE WRIT OF ERROR BE DISMISSED, OR THAT THE JUDGMENT OF THE LOWER COURT BE AFFIRMED.

J. C. MCREYNOLDS,
Assistant Attorney-General.

WASHINGTON, *April, 1904.*

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